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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 661.

WHITAKER WRIGHT,
Appellant,

vs.

WILLIAM HENKEL, United States Marshal for the Southern District of New York, ET AL.,
Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Appellant's Brief in Reply to Supplemental Briefs Submitted after Argument.

C. B. Burgoyne, Walker and Centre Streets, N. Y.

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WHITAKER WRIGHT, Appellant, vs. WILLIAM HENKEL, United States Marshal for the Southern District of New York *et al.*, Appellees.	No. 661.

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I.

The comparatively unimportant penal offense under Sub. 3, Section 611 of the Penal Code is not "fraud of a director" within the meaning of the treaty and is not extraditable. Proof of fraud in support of a change under that section would be surplusage.

We agree with the Solicitor General that proof which would satisfy Section 84 of the English Larceny Act

would also make out the offense under Section 611, in the sense in which proof of murder would establish the crime of assault with intent to kill. We do not, however, agree that they are therefore the same offense under different names or that they have anything in common.

A case is made out under Section 611 with less proof than is required to satify the English law. It is not necessary to prove fraud under Section 611, and, therefore, the act is not " fraud of a Director." Fraud is no element of the offense. Section 611 is headed: " *Misconduct of Officers and Employees of Corporations.*"

It reads as follows :

" 611. Misconduct of officers and employees of corporations.—A director, officer, agent or employee of any corporation or joint-stock association who :

" 1. Knowingly receives or possesses himself of any of its property otherwise than in payment for a just demand, and with intent to defraud, omits to make or to cause or direct to be made a full and true entry thereof in its books and accounts ; or,

" 2. Concurs in omitting to make any material entry thereof ; or,

" 3. Knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false ; or,

" 4. Having the custody or control of its books, wilfully refuses or neglects to make any proper entry in the stock book of such corporation as required by law, or to exhibit or allow the same to be inspected and extracts taken therefrom by any person entitled by law to inspect the same or to take extracts therefrom ; or,

" 5. If a notice of an application for an injunction affecting the property or business of such joint-stock association or corporation is served upon him, omits to disclose the fact of such service and the time and place of such application to the other directors, officers and managers thereof ; or,

" 6. Refuses or neglects to make any report or statement lawfully required by a public officer, is guilty of a misdemeanor."

Attention has been called to the title of Chapter XI. in which Secs. 611 is contained, as showing that the offence involves fraud. It will be seen by reference to the twenty-five sections constituting that chapter that the title is misleading. The chapter embraces Secs. 590-614. The earlier sections only deal with frauds. Most of the others do not

Subs. 4, 5 and 6 of Sec. 611 are fair illustrations of offenses in which fraud constitutes no element. A person having the custody of corporate books who (1) neglects to allow them to be inspected and extracts taken; or (2) who omits to disclose the service of an injunction order upon him to his co-directors; or (3) neglects to make any report or statement required by a public officer, is guilty of a misdemeanor.

Sub. 3, Sec. 611, which is the provision relied on as establishing that the fraud of a director is made criminal in New York, does not require a single element of fraud to make out the offense. Whoever knowingly concurs in making or publishing a report which is false violates that provision, in the same way as the person who forgets or neglects to file a report required by law violates sub. 6 of the same section, and is subject to the same penalty, however innocent may have been his motive.

Section 614 of the Penal Code reads as follows:

"A director of a corporation or joint-stock association is deemed to have such a knowledge of the affairs of the corporation or association as to enable him to determine whether any act, proceeding or omission of its directors is a violation of this chapter. If present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of this chapter occurs, he must be deemed to have concurred therein, unless he at the time causes or in writing requires his dissent therefrom to be entered on the minutes of the directors. If absent from such meeting, he must be deemed to have concurred in any such violation, if the facts constituting such violation appear on the record or minutes of the proceedings of the Board of Directors, and he remains a director of the corporation for six months thereafter without causing

or in writing requiring his dissent from such violation to be entered on such record or minutes."

Sub. 3 was framed to reach the case of a director who knew or ought to have known that a report was to be made or published and permitted it to be done ("knowingly concurred in making or publishing") without first taking upon himself the duty of ascertaining whether the report was true; its purpose was to hold directors to the performance of their duties. If the director was present at a meeting at which such a report was authorized and he did not dissent from its being made or published; or if he was absent and did not within six months thereafter dissent, if, the report turned out to be false even though he did not know it, he is "deemed to have such a knowledge of the affairs of the corporation as to enable him to determine," and is guilty of a trifling offense punishable very much as would be fast driving or disorderly conduct. He did not properly perform his duties as a director. He ought to have known whether the report was true or false before *permitting* it to be made or published. The statute does not require that he should know the report to be false. If it afterwards appears that the report was in fact false, it was his duty to have dissented from its making or publication *until he knows it to be true.*

It is not possible that this could have been intended as an extraditable offense. There is not an element of fraud required to be proved to constitute the offence. It certainly is not "fraud of a director" within the meaning of the treaty. It may with equal force be claimed that the offenses of neglecting to exhibit corporate books or to disclose the service of an injunction order or to make any report required by a public officer, all of which are contained in the same section, are within the treaty.

The wording of sub. 1 of the same section, in which intent to defraud is in express words made an element of the offense, emphasizes the intention of the

law makers that proof of fraud should not be required to establish an offense under sub. 3.

The Solicitor General very truly says:

"Treaties are necessarily reciprocal engagements."

Would extradition lie from England for an offense under sub. 3, Section 611? *It is not made criminal by the laws of Great Britain.*

Section 84 of the Larceny Act under which the defendant is charged, requires that the report shall not only be knowingly false, but in express terms that it shall have been made with intent to deceive or defraud. The mere false report without the fraudulent intent is not criminal there.

This is met by the suggestion that a lesser offense than the act made criminal in England is criminal in New York, because the mere concurrence in a false report is made criminal in New York without proof of fraudulent intent. True, but every trifling penal act is not extraditable. The fact that the concurring by a director in the making of a report, if it turns out to be false, is made criminal in New York without proof of fraud, whilst it is not criminal in England, does not make the act here "fraud of a Director," within the terms of the treaty.

A comparison of the two statutes discloses that while the crime created by the New York law involves no moral turpitude and is a venial offense of the same character as an act of negligence, the English offense is one which involves moral turpitude, and would, under the decisions of this Court, be treated as an infamous crime.

Section 84 unmistably refers to the fraud of a director; while Section 611 defines an offense which does not come within the category of fraud. Hence, whatever may be said of the character of the offense which it defines, it cannot be denominated "the fraud of a director."

It has been asked whether, in case of a prosecution under Section 611, it could not be proven that the accused had made or concurred in the making or pub-

lishing of a false report with a fraudulent intent. It is believed that such proof would be foreign to the subject matter of the indictment, and, therefore, incompetent. At all events it would not be essential in support of the indictment. The allegation of fraudulent intent, if contained in the indictment, would be treated as surplusage.

Lohman vs. People, 1 N. Y., 379.

The crime created by Section 611, subdivision 3, is a statutory crime. Such an offense was unknown at common law. The essentials of the crime must be found within the statute, and the act of the legislature cannot be enlarged in its scope by the ingenuity of the pleader, or by the character of the proof which may be presented by the prosecutor in substantiation of the statutory offense.

In case of a statutory crime an indictment which follows the language of the statute is sufficient.

U. S. vs. Gooding, 12 Wheat., 460.
Commonwealth vs. Hobbs, 140 Mass., 443.
Trout vs. State, 111 Ind., 499.
Baysinger vs. People, 115 Ill., 419.

Where the offense is *malum prohibitum* and the statute embraces no words providing that the fraudulent intent or other criminal intent constitutes a part of the definition of the offense, it is neither necessary to allege nor to prove the existence of such intent.

This is illustrated by the statutes against adulterations of milk :

Commonwealth vs. Farren, 9 Allen, 489.
Commonwealth vs. Nichols, 10 Allen, 199.

against the sale of intoxicating liquors :

Commonwealth vs. Boynton, 2 Allen, 160.
Commonwealth vs. Goodman, 97 Mass., 117.

against the sale of naphtha under an assumed name :

Commonwealth vs. Wentworth, 118 Mass., 441.

In cases of this character fraudulent intent is not a necessary ingredient of the crime.

People vs. Cipperly, 101 N. Y., 634.
People vs. Kibler, 106 N. Y., 321.
Haggerty vs. St. Louis Ice Mfg. & Storage Co., 40 L. R. A., 151.

In the case last cited the Court said:

"The offense prohibited by section 3902 is a misdemeanor, and in such case the intention of the misdemeanant cuts no figure in the case, since in that class of crimes intention constitutes no element of the offense. It is the act done, and that alone, which violates the law, and the motive which prompts the violation is altogether dehors the crime committed. This point is illustrated by various adjudications respecting the sale of liquors to minors and the marriage of minors, supposing the parties in each case to be of age"

Halsted vs. State, 41 N. J. Law, 552, is a valuable illustration of a similar case.

In the English Act the gravamen of the offense is the fraudulent intent. In the New York statute that element does not exist.

There is nothing strange in the circumstance that the making of a false report with intent to defraud is not specifically made criminal under the New York Penal Code when the entire Act is examined. A person who obtains money or property by means of a false statement is guilty of *larceny.* It is not claimed that the defendant profited by the report in question. A false report which does not result in inducing any one to part with money or property is not made punishable. But the integrity of corporate reports is protected under Section 611, where the element of fraud does not enter. This holds directors to a higher degree of accountability than the English law, but every mere act of negligence, though made penal, does not thereby become fraud and is not extraditable.

Many very serious criminal offenses are not extraditable. Only a small proportion of the hundreds of crimes enumerated in the Penal Code are covered by the treaty. The defendant might well be guilty of violating Section 611 without coming within the English statute. True, if he has violated the English statute, he is also within Section 611, but only in the sense that a man who commits larceny is liable also for conversion. He may be liable for conversion without being guilty of larceny.

II.

Section 514 of the New York Penal Code has no possible bearing on any question now before the Court. The only complaint in the record is that of March 16, for making a false report.

In the brief prepared by Mr. Fox, after the argument in this Court, we are for the first time met with an attempt to support the complaint of March 16th, charging the making of a false report, by reference to the complaint of March 31st, which also charges the making of false entries in a book. That complaint is not part of the record and could not have been. It was not made until more than two weeks after the warrant under review was issued.

March 18th this writ was issued.

March 20th it was argued before Judge LACOMBE.

March 30th it was decided adversely to the appellant.

Making false entries may or may not be an extraditable offense. No such question is before this Court. It is not an answer to our contention that the making

of a false report is not extraditable to urge that something else is.

The discharge of the defendant under the warrant now under review will still leave him to answer that part of the complaint of March 31st charging false entries, if that offense be extraditable.

We submit that this Court will not travel outside the record to determine whether another charge, as to which there has been no hearing or decision, and as to which there is no appeal pending, is or is not extraditable. Nothing is to be gained by such an irregular and unusual proceeding. Whether the making of a false report be an extraditable offense must in any event be decided, even if the defendant be eventually held on the charge of making false entries. He can be tried only for the offense for which he is extradited. The final warrant for his surrender must of necessity designate the charge on which he is surrendered.

If the defendant is discharged upon the warrant now under review, and a case is made out under the warrant of March 31st, then, and not until then, will the bearing and construction of Section 514 of the Penal Code be presented. At this time everything points to that charge being an afterthought. If, however, it be true that proof will really be forthcoming to support it that hardly furnishes a reason for deciding that the making of a false report is extraditable.

III.

Comity as affecting the construction of the treaty.

The Solicitor General makes an eloquent plea for a liberal and, if necessary, a strained construction of this treaty. He would do away with the definition and

rules of construction applicable to other agreements and engagements.

We quote from page 5 of his brief as follows:

"The suggestion is volunteered that in proceedings to extradite for arson, for example, England would recognize our claim, although the strict conditions of the comman law definition had been enlarged in order to extend the remedy in the particular State of the Union where the crime was committed. A higher idea of comity pervades the entire field, and the drift is, I think, to recognize and include under existing treaties statutory redefinitions of old offenses."

We fail to find anything in the history of English jurisprudence or in the recent authorities of the English Courts in extradition cases to support these assertions. We find, on the contrary, a consistent, unyielding adherence to the terms of the treaty engagements, and a refusal to enlarge or extend the obligation. This is so, although in every case that has come under our observation the person whose custody was sought by this country was one of our own citizens—not a British subject. How much further the English Courts would have gone in refusing extradition where it concerned their own citizens it is not necessary to speculate. That there has been no relaxation in the strict interpretation of the treaty since the Windsor case is fairly illustrated by the decisions in the Eno case and in the recent Greene and Gaynor case.

The suggestion that England would extradite for arson for a crime not within the English definition is not supported by a single instance in which Great Britain or any of her colonies has ever allowed extradition for a crime not within its laws. Yet it is here sought to extradite the defendant for an offense which if committed in England would not be punishable there. The defendant either is or is not extraditable under a fair interpretation of the language of the treaty. The English Government is not asking extradition as a favor or on the ground of comity, but as a right under the treaty. Any appeal on the ground

of comity would be addressed to the Executive and not to the Judicial Department. Great Britain has construed various provisions in this treaty, notably in the Windsor case, and she can certainly ask no more than that we adopt her own construction of it. Her position has been just and dignified. She has never, so far as we have been able to learn, sought to curry favor with this country by voluntarily surrendering a person whose offense was not extraditable under the treaty. The responsibility of a departure from the terms of the contract must rest with the Executive Department; it is not within the province of the judiciary to enlarge the treaty.

Terhuden vs. Ames, 184 U. S., 289.

IV.

The allowance of bail as affecting our treaty obligation.

Much has been said as to our obligation under the treaty to surrender the offender, as a reason for taking from the Courts the power to allow bail in all such cases.

There can be no complaint of laxity in the discharge of our treaty obligations if we apply to the offender the same rules of procedure that would be applicable to our own citizens.

The evidence of criminality is to be such as, according to the laws of the place where the person is found, would justify his apprehension and commitment if the offense had been there committed. The procedure is presumably to be governed by the laws of that place. The contention that in the absence of statutory authority there is no power in the Courts in the general administration of justice, to allow bail, is not conceded.

If the judicial discretion is exercised in the administration of justice in an extradition case, in the same way in which it would ordinarily be exercised in the administration of justice in dealing with our own citizens, we will have done all that can possibly be required of us.

No reason has been assigned for inflicting cruel and inhuman punishments in order to satisfy a conception of treaty obligations more fancied than real. It is often times more easy than just to take an exalted and exaggerated view of moral obligations.

It is argued that the concluding clause of the treaty which provides that "if, after the hearing, the evidence is deemed sufficient to sustain the charge, it shall be the proper duty of the Magistrate to certify the evidence to the executive authority, and that a warrant may issue for the surrender of such fugitive," implies that bail shall not be allowed at any stage of the proceedings. We submit that if there is any presumption created by this language, it is quite to the contrary when read in connection with the preceding clauses. We are not now dealing with the case of a defendant who asks to be admitted to bail *after a surrender warrant has issued*. Whether or not bail would then be allowed is a different question, although even in that case we think the *power* to allow bail exists.

The question here is whether, pending a hearing on charges, there is a power to allow bail. As to that proposition we say that the power to hear the evidence and determine its sufficiency implies the incidental power to deal with the custody of the defendant meantime in the same manner as though the offense had been committed here.

The Right to Bail.

The Solicitor-General has cited *Gorsline's Case (21 How. Pr., 85)* in support of the proposition that, where an offender has been arrested on a warrant in

one county to be taken to another in which he has been indicted, he cannot be admitted to bail in the county where he has been arrested, because he has not been committed, and argues that this is parallel to an arrest in extradition proceedings.

An examination of the case shows, however, that the decision did not involve the power of the Court to admit to bail, but simply the interpretation of a statute regulating the subject of bail.

The case cited has been limited, if not overruled, by the Court of Appeals in *People vs. Clews* (*77 N. Y., 39*), where it was held that one arrested upon a warrant after indictment may be admitted to bail by a Justice in a county where he is arrested, although the indictment was found in another county. The language of Judge FOLGER is quite apposite :

" Surely it is fair to the citizen, and not harmful to the State, and hence, not hostile to public policy, that one indicted in a county remote from his home, and arrested elsewhere, while the court is not in session, which alone may give him a speedy trial, or, as a court, let him to bail, should have a ready means of giving bail in his own vicinage."

It is also urged on behalf of the appellee that the law does not allow sureties to retake a prisoner who has been admitted to bail should he escape into another State. This observation is at war with the decisions of this Court.

In *Taylor vs. Taintor (16 Wall., 371)*, Mr. Justice SWAYNE said :

" When bail is given the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their right in person or by agent. *They may pursue him into another state;* may arrest him on the Sabbath, and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is

needed. It is likened to the re-arrest by the sheriff of an escaping prisoner. In 6 Modern it is said: 'The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge.' The rights of the bail in civil and criminal cases are the same."

In *re Von der Ahe (85 Fed. Rep., 959)* the petitioner had given bail in Pennsylvania. His sureties undertook to seize him in Missouri and remove him to Pennsylvania on the authority of *Taylor vs. Taintor (supra)*. It was decided that this could be done.

The principle was likewise applied in *Cosgrove vs. Winne (174 U. S., 64)*, where a prisoner extradited from Canada to Michigan, who had given bail and thereafter returned to Canada, was held not subject to arrest for a non-extraditable offense while voluntarily at Detroit before the time fixed for trial, he being deemed in the actual custody of his sureties, and hence undergoing imprisonment.

In addition to the Chinese deportation cases which have been cited in our main brief on the subject of bail, we call attention to the fact that it has been usual in cases of that character to allow bail pending an appeal to this Court, and that among the cases in which such bail was allowed were the following:

In re Li Sing, 180 U. S., 486.
U. S. vs. Mrs. Gue Lin, 176 U. S., 459.
U. S. vs. Wong Kim Ark, 169 U. S., 649, 652.
Chin Back Kan vs. U. S., 185 U. S., 213.

In the last of these cases bail was taken by Mr. Justice PECKHAM.

These cases are the more in point in view of the fact that there was no provision in any of the Chinese exclusion acts on the subject of bail prior to 1893.

By section 2 of the act of November 3, 1893, which related solely to deportation in cases of non-registration, it was provided:

"Such order of deportation shall be executed by the United States Marshal of the district within which

such order is made, and he shall execute the same with all convenient dispatch ; and pending the execution of such order such Chinese person shall remain in the custody of the United States Marshal *and shall not be admitted to bail.*"

The fact that in the case provided for in the statute it was deemed necessary to make an express provision prohibiting admission to bail is a strong argument in favor of the inherent right to admit to bail in the absence of such prohibitory language.

Notwithstanding the express provision of the Act of 1893, Chinese prisoners in cases other than those of deportation for non-registration have been admitted to bail, as is indicated by the cases to which reference has been made.

Respectfully submitted,

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